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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 418

THOMAS J. EVANS, JAMES F. TORRANCE, CHARLES W. STICKLER and CLAYTON A. LANDSIDLE, *Petitioners*,

v.

THE COMMONWEALTH OF PENNSYLVANIA, *Respondent*.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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PETITION FOR REHEARING

This Court denied certiorari in this case on November 21, 1960. Petitioners again contend that this Court should grant the writ on the constitutional grounds set forth in the original Petition, and because cases decided subsequent to the denial justify this Petition and provide substantial grounds for granting certiorari.

Petitioners are cognizant of the fact that this Court must carefully select the cases it will decide, not on the basis of individual hardship, but on the basis of the need of our system of justice for an authoritative decision that will result in greater justice for many individuals. Petitioners know that every case cannot be entertained, even if those involved have not been

afforded all possible Constitutional protection. But it is believed that this case falls within the class of cases in which a decision by this Court will assure petitioners of a fair trial and help draw definitive guidelines for other cases of a like nature. It is on this premise that petitioners now petition for a rehearing.

The contentions of petitioners can perhaps be best capsulized by quoting Chief Judge Woodbury of the First Circuit Court of Appeals in *Sampedro* v. *People of Puerto Rico*, 281 F. 2d 888, 893:

> "There is enough trial by newspaper in this country already. We shall not encourage that evil practice further by sanctioning oral confessions for the benefit of those elements of the press which seek to profit by pandering to the morbid craving for the sensational and sadistic."

What Judge Woodbury said should be applied with equal force to the unjust use of television by the Pennsylvania Governor in this case for political purposes.

It now appears that, had this trial occurred in a federal court in Pennsylvania, petitioners would have been spared the injustice caused by the irresponsible public condemnation by the Governor of Pennsylvania.[1]

On November 29, 1960, subsequent to this Court's denial of certiorari in this case, a Philadelphia news-

[1] Although this is a state case and the Fourteenth Amendment applies, the same constitutional safeguards for a fair trial as the Fifth Amendment provides for federal defendants are afforded. This Court in terminating the "silver platter" doctrine in *Elkins* v. *United States*, ... U. S. ....., 4 L. ed. 2d 1669, spoke clearly on this point.

paper headlined a story, appearing at page 31, of a trial[2] in the United States District Court in that city in this manner:

"2 Gamblers Called Tax Evaders"

The two defendants were on trial for violation of federal tax laws on betting. Judge C. William Kraft, Jr., upon motion by counsel for the defendants, granted a mistrial. He felt that the prejudice caused by the headline writer who had "assumed what the government has undertaken so laboriously to try to prove . . . ," would deny the defendants a fair trial. He felt that he was obliged by the decision of this Court and the Court of Appeals to declare the mistrial rather than send a case into appellate tribunals, that were bound to reverse it.[3] (App. pp. 3a and 4a)

Judge Kraft explained his action in these words:

> "The decisions of those Courts are clear that it is the duty of the trial judge to be extremely circumspect in endeavoring to see that the defendant has a trial which is essentially fair and free from any prejudicial sidelights because, as I tried to make clear to you yesterday, the purpose of a trial such as this is to resolve the guilt or innocence of a defendant or defendants not upon what the people surmise or what is said in the newspapers or upon anything except what is the evidence produced in the courtroom, which is the time and the place to produce it. But human beings as we are, and subject to the human frailties to which all of us are in lesser or greater degree subject—we do read newspapers, we listen to radio, we watch tele-

[2] U. S. v. Minker, et al., No. 20368, United States District Court for Eastern District of Pennsylvania.

[3] The transcript of the proceedings mentioned are printed in the Appendix hereto.

vision, and with the right of the free press the Court is powerless except in very unusual circumstances to prevent printing what the press regards as legitimate news." (App. p. 3a et seq.)

If that same case were in the Pennsylvania state courts no mistrial would have been declared, because the decision in petitioners' case stands unchallenged and is authority for far greater license to newspapers, television and radio.

Consider how the rights of petitioners were prejudiced. Their indictment and trial were almost buried with publicity and they were on two occasions on television denounced by the Governor of the State as swindlers and thieves, as examples of Republican dishonesty and graft.[4] The Pennsylvania State courts did not so much as blink their judicial eyes at this exhibition of political football. Compare this with the Minker case, in which a federal court acted firmly to destroy any possibility of prejudice caused by some unknown headline writer. These two cases show that there exists in Pennsylvania for persons accused of

[4] Tape recordings of TV broadcasts lodged with the Clerk of this Court. The Governor's first remarks about petitioners in his first telecast were:

"You've seen the headlines—you'll see more. Investigation meanwhile goes on. The latest example of how the Republican leaders did business is the Turnpike scandal. A special Grand Jury is now investigating this development. We're proud of our Turnpike, justifiably so. It's one of the great highways of the world. And we have a right to be angry that anyone would use it to swindle. Yet this has been done. Certain people set out to steal $20,000,000 from it and they got $9,000,000 before we could stop them. Their front was a company called Manu-Mine Research and Development." (Tr. 17a)

crime, a dual standard of the constitutional right to a fair trial.[5]

Ill-advised publicity caused by public officials was severely criticized by the Court of Appeals for the Second Circuit when it overturned the convictions in the so-called Apalachin cases[6] on November 28, 1960. Both the majority opinion and the concurring opinion had something to say about the "unusual and disturbing publicity" that accompanied the trial and investigation and even continued during the appeal due in great part to writings in the public press by former prosecutors in the case.

Chief Judge Lumbard, in the majority opinion, viewed the "hue and cry" raised by newspaper, magazine, and television expressing "the suspicions of governmental authorities that it was a meeting of underworld overlords and their vassals, commonly credited with being members of the Mafia, called for various unknown but illegal purposes" as an ample reason why the defendants were most reluctant to explain their presence at the meeting. He regarded this as just as likely as the government position that the defendants had conspired to conceal the illegal purposes of the meeting.

Judge Clark, concurring, spoke also for his two brother judges, when he stated that publications by

[5] It is petitioners' understanding that a case closely analogous to this case was argued before the Third Circuit Court of Appeals *en banc* on October 17, 1960, and now awaits decision. (*United States* v. *Carlucci*, et al., Nos. 13136-12141, 13162) It would have bearing on the principle involved in this case.

[6] *United States* v. *Bufalino, et al.*, No. 357, October Term, 1959, Docket No. 26194, United States Court of Appeals, 2nd Circuit, ... F. 2d .....

former special prosecutors while the appeal was pending were "improper". He deemed it an unfortunate feature of the case that it "was given unusual and disturbing publicity in newspapers, journals, and magazines". Judge Clark intimated that the tenor of the publicity—that law enforcement faced a crisis and "crash methods" resulting in imprisonment of the defendants were welcome and justified—may have encouraged the prosecution that should "never have been initiated or allowed to proceed so far".

There is a real need for this Court to speak definitively on the problem of publicity and its influence upon the processes of justice both state and federal. This Court with this case has the opportunity to act effectively to alleviate the growing problem about which Mr. Justice Douglas observed in his August, 1960 article, *The Public Trial and the Free Press*, (46 A.B.A.J. 840, 841):

> ". . . The television trial may produce evidence to convice the witness; and *it may so saturate the country with prejudice against an accused that a fair trial may be next to impossible. . . .*" (Emphasis added)

The Minker case and the Apalachin Cases are typical of the effect that misuse of public media of communications can have upon an accused's chance for a fair trial. Notoriety in publications and in television can be especially devastating to justice when it is precipitated or encouraged by public officials who deem it necessary to make their views of a case universally known to the public. Petitioners were victims of this type of prejudicial notoriety. And the unusual departures from ordinary forms of justice at the trial, which were enumerated in the Petition, can be in large

part attributed to the atmosphere thus intentionally created by the Pennsylvania Governor. The unwarranted publicity, which Judge Clark suggested in the Apalachin Cases caused a prosecution that "should never have been initiated", in petitioners' case inspired the prosecution to resort to devices ordinarily not countenanced in American courts.

These "devices" have been fully described to this Court in the Petition, but one bears repeating in this Petition for Rehearing, because of its relation to the prejudice caused by the Governor, the highest official in the State.

Two other top State officials, the Deputy Attorney General and the Chief Counsel of the Highway Department, took the witness stand and presented the law of the case to the Jury. Petitioners have argued persistently that such testimony was an outright usurpation of the judicial function, and that they were thereby deprived of judicial supervision of their trial. But the point that petitioners wish this Court to consider now is the relation of this complete departure from the usual practice in Pennsylvania to the position that the Governor had previously taken when he televised his opinions in the case. The jury knew that their Governor wanted convictions and then two other important State officials told them what law was applicable. In fact, the law testified to was incompletely interpreted to them and part of it was wholly inapplicable. This faulty legal foundation for the Commonwealth case received the approbation of the trial judge and was given by witnesses of most impressive legal and official standing. It is to be doubted that the jury even regarded these men as witnesses; they had every ap-

pearance as official authorities on law to be respected in the same manner as the judge.[7]

This Court early considered how a law may be proved in court and warned against the use of a witness when the official text of the law itself was available. In *Ennis* v. *Smith*, 14 How. 400, 426-7, the Civil Code of France was involved in settling the will of General Kosciusko, and this Court quoted Lord Campbell on the problem of how the Code should be proved:

> "'The most authentic form of getting at foreign law, is to have the book which lays down the law.' Thus, we have had the Code Napoleon in our courts. It is better than to examine a witness, whose memory may be defective, and *who may have a bias influencing his mind upon the law*:" (Emphasis added)

That the case was concerned with the proof of a foreign law does not detract in any way from the caution expressed by this Court and Lord Campbell which has been italicized in the part quoted. Both witnesses used by the Commonwealth to give the Pennsylvania law to the jury were subject to suspicion of bias. Both were appointees of a Governor who had publicly broadcast his judgment in this case. Both, moreover, had the special influence upon their minds caused by their official positions: one as the Deputy Attorney General hopeful for a successful prosecution by his office, the

[7] In this regard, the use of these "official" witnesses to give their views of the law, one of whom could as easily have been prosecuting the case as testifying, is extremely similar to the improper conduct of a prosecutor who airs his views of the case in the public press or similar media, and should be equally condemned. The impropriety of public expression of a prosecutor's views in the press was considered in the concurring opinion of Justices Harlan and Frankfurter in *Ciucci* v. *Illinois*, 356 U.S. 571, 573.

other as the Highway Department Chief Counsel hopeful of an interpretation of the law that would subject the Turnpike Commission to his department's control, an interpretation expressly contrary to a statute provision[5] he omitted from his testimony.

CONCLUSION

Petitioners ask this Court to reconsider their case in the light presented by this Petition for Rehearing, and, in particular with reference to stand taken by the United States District Court in the *Minker* case. That Decision raises the question whether defendants in criminal cases in the Federal courts in Pennsylvania receive higher Constitutional protection than their counterparts in the state courts. There should be one standard for both: a fair trial not subject to public prejudice aroused by irresponsible use of newspapers, magazines, radio, or television.

Respectfully submitted,

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Attorneys for Petitioners

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

PEYTON FORD
Attorney for Appellants.

[5] At p. 24 of the original Petition, 36 P. S. § 670-103 is quoted. It excludes "(a)ny law administered by the Pennsylvania Turnpike Commission" from the operation of the Highway Department Act.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 20368

UNITED STATES OF AMERICA

v.

ABRAHAM MINKER, also known as ABE MINKER, and JOHN A. WITKOWSKI, also known as JOHN A. WITTIG

Philadelphia, Pa., November 29, 1960

Before Hon. C. WILLIAM KRAFT, JR., J., and a jury

Present: WALTER E. ALESSANDRONI
United States Attorney, and

ROBERT J. THOMPSON
Assistant U. S. Attorney
for the Government.

JACOB KOSSMAN, ESQ.,
for the defendants.

SECOND DAY

Mr. Kossman: May we approach the bench?
The Court: Yes.

(The conference at side bar was as follows:)

Mr. Kossman: There appeared in the Philadelphia Inquirer in all editions, this statement, which says "Two gamblers called tax evaders."

Now, they have no right to call Mr. Minker a gambler. He has never been locked up in his life, never. Now, this appeared in all editions in which they said, "Two gamblers called tax evaders, two alleged number racketeers."

The Court: I have not seen the article so let me look at it.

(Page 31 of the Philadelphia Inquirer dated Tuesday Morning, November 29, 1960, was handed to the Court.)

Mr. Kossman: I feel that the paper—it is the only morning newspaper of general circulation and I think that most of the people on the jury must have seen it, they read a paper, and that it is obviously so prejudicial that I am going to ask for a mistrial based on a statement of that type.

I remember Your Honor has had some occasion involving newspaper publicity some time ago.

The Court: What have you to say, Mr. Alessandroni?

Mr. Alessandroni: Of course, the Government is not responsible for what the newspapers print.

The Court: We realize that.

Mr. Alessandroni: I have no knowledge that the jury has read it and I don't know that if they did read it that it would in any way be prejudicial.

These two persons are being charged as gamblers and it is a serious criminal offence and this is what the Government intends to show.

Mr. Kossman: It is one thing to say two people are charged with being gamblers, it is another thing to say "two gamblers."

Then they talk about alleged racketeers.

(End of side-bar conference.)

The Court: Members of the jury I inquire of you whether any of you have read the article appearing in the Philadelphia Inquirer of Tuesday morning, November 29, 1960, that is today, respecting the case and the defendants now on trial.

Will you raise your hands, please. Just keep them raised a moment.

(Some jurors raise their hands.)

The Court: Jurors 3, 4, 5, 6, 8, 9 and 10.

We direct that the copy presented by defendants' counsel in support of his motion be marked as Exhibit D-1 and filed as part of the record in this proceeding as the paper which was offered in support of that motion.

(Page 31 of the Philadelphia Inquirer of Tuesday morning, November 29, 1960, was marked Exhibit D-1 for identification.)

We will ask the bailiff for the present to withdraw the jury and I should like to hear argument by counsel in chambers on the question of the pending motion.

(Recessed from 10:08 a. m. until 10:25 a. m.)

(Jury reenters the courtroom at 10:26 a. m.)

The Court: After hearing further argument of counsel on the motion made on the defendants' behalf for mistrial, we grant the motion, withdraw a juror and declare a mistrial.

Members of the jury, you may wonder about it, you may think that it is unnecessary, that none of you were or could be prejudiced in your consideration of the case by the article, but we are bound by the decisions of the United States Supreme Court and the Court of Appeals for this Circuit.

The decisions of those Courts are clear that it is the duty of the trial judge to be extremely circumspect in endeavoring to see that the defendant has a trial which is essentially fair and free from any prejudicial sidelights because, as I tried to make clear to you yesterday, the purpose of a trial such as this is to resolve the guilt of innocence of a defendant or defendants not upon what the people surmise or what is said in the newspapers or upon anything except what is the evidence produced in the courtroom, which is the time and place to produce it. But human beings as we are, and subject to the human frailties to which all of us are in lesser or greater degree subject—we do read newspapers, we listen to radio, we watch television, and with the right of the free press the Court is

powerless except in very unusual circumstances to prevent printing what the press regards as legitimate news.

In this case much of the article would be unprejudicial, merely recitation of fact, but unfortunately some headline writer apparently decided he didn't have enough space to print his headline and represent the actual facts so he announced in broad, bold, black type that these two men were gamblers. Whether they are or not, I don't know. The Government contends that they are and the burden of proof is on the Government to prove that as part of its case by evidence beyond a reasonable doubt.

Why the headline writer assumed that which the Government has undertaken so laboriously to try to prove, I don't know, except it might appear that the word "accused" or "suspected" or "alleged" contained too many letters to fit into the headline, and tied in with the body of the article was the phrase "numbers racketeers." Of course, they are accused in this case of being persons engaged in accepting number bets or wagers.

The word "racketeer" in idiom today connotes something a little more than a person who takes a bet.

There is nothing we can do, as I have said, about what is published in the newspaper.

It is lamentable with the effort that the Government has put forth, with the attendant expense to the taxpayers to make this investigation, and the labors of the United States Attorney and his assistant who are, of course, wholly blameless in this situation—they are as powerless as are you and I—with all the effort they have put forth to prepare their case and subpoena their witnesses and be prepared to go forward with the trial, that such a thing has happened. And equally the defendants have been called upon to, of course, engage counsel. I assume his time is not to be without reward. They have had to prepare themselves for the trial of this case in which they contend that they are not guilty of the crimes of which they are accused, and they are also put in the position that they are deprived of having their day in court.

It is unfortunate but it is our view that under the law it is essential that we grant the motion that was made, and for that reasons we have granted it because it would seem utterly purposeless to us to take the time of all of counsel and of all of the parties and witnesses in this case, and your time and mine, for a trial of ten days, two weeks or possibly longer, and have a determination by you of the defendants' guilt or innocence, and then if you found the defendants guilty to have the inevitable appeal based, among other things, on this very ground, and to have the Court of Appeals then set aside all that had been done.

If what is undertaken to be done is now aborted, it strikes me that it is better aborted at the outset than after all the labors have been put forth at length, some believed result achieved and then have it all thrown out.

We are sorry that your time has been wasted, as we are sorry that our time has been wasted because this is a busy court. We thank you for your services in the case and excuse you now from further service in it and you will withdraw to the jury room from which you were selected.

The court will stand in recess and I should like to see counsel, and I would ask defendants' counsel to ask his clients to remain so that if there is to be discussion of a future trial date that we can try to see what can be resolved in that direction at this time.

Mr. Alessandroni: If Your Honor please, could the Government request that all exhibits be returned to the Government.

The Court: The court reporter is directed to return and make proper notation on the record of the return of the exhibits heretofore marked and admitted in evidence or heretofore marked, not admitted in evidence but in the reporter's possession.

Mr. Alessandroni: Thank you, sir.

(Government Exhibits 1, 1A, 2, 3, 4 and 5 were returned to Mr. Thompson. Exhibits G-6 and 7 at this time are in the marshal's office and under his control.)